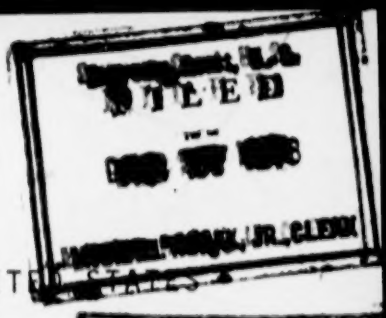
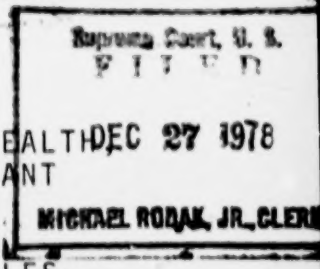


No. 78-808

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978



JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

NORMAN J. BOLES AND MARGARET GONZALES, AND ALL OTHERS SIMILARLY SITUATED, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

MOTION OF APPELLEES TO AFFIRM OR ALTERNATIVELY TO DISMISS THE APPEAL

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No. 78-808

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JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

NORMAN J. BOLES AND MARGARET GONZALES, AND ALL OTHERS SIMILARLY SITUATED, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

MOTION OF APPELLEES TO AFFIRM THE JUDGMENT OF THE DISTRICT COURT AND TO DISMISS THE APPEAL AS TO QUESTION 3 OF THE JURISDICTIONAL STATEMENT

Appellees Norman J. Boles and Margaret Gonzalez, individually and on behalf of the plaintiff class, move that the judgment of the District Court be affirmed, and alternatively that the appeal be dismissed as to Question 3 of the Jurisdictional Statement.

OPINION BELOW

The opinion of the District Court is unreported and is set forth as Appendix B to the Jurisdictional Statement.

JURISDICTION

The judgment of the District Court was entered on June 23, 1978 and held that denial of Mothers Insurance Benefits, 42 U.S.C. § 402(g), to illegitimate children and their mothers was unconstitutional. Appellant asserts jurisdiction of this appeal under 28 U.S.C. § 1252.

QUESTIONS PRESENTED

The Jurisdictional Statement, p. 2, suggests three questions for review. The first relates to the merits and the second to the appropriateness of class relief. The third question seeks to raise a defense never asserted in the court below, namely, sovereign immunity as a bar to retroactive benefits for the individual named plaintiffs. Appellees submit that this last issue is not properly before this Court.

APPELLEES' STATEMENT OF QUESTIONS PRESENTED

1. Is it unconstitutional to deny Mothers Insurance Benefits to all illegitimate children and their mothers while granting these benefits to all legitimate children and their mothers, regardless of actual dependency?

2. Where the action does not seek, and the District Court's order does not grant, Social

Security Benefits to members of the class, did the District Court have authority to order that all members of the plaintiff class be given notice that the unconstitutional marriage requirement was no longer a bar to their receipt of Mother's Insurance Benefits, so as to avoid forfeiture of benefits by the failure of unknowing claimants to apply?

3. May the defense of sovereign immunity be raised for the first time in this Court, if it was never raised or pleaded as an affirmative defense in the District Court?

STATEMENT

Mother's Insurance Benefits are provided under the Social Security Act, 42 U.S.C. § 402(g), to allow the surviving child of a deceased worker to receive the care of its surviving parent. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). The three principal eligibility requirements for Mother's Insurance Benefits, so far as this case is concerned, are:

(1) that the child be eligible for or receiving Children's Insurance Benefits;

(2) that the child be in the care of its mother; and

(3) that the mother of the child had been

married to the deceased father, either at the time of his death or an earlier marriage followed by a divorce.

The first two requirements have been met herein. Plaintiff Boles is receiving Children's Insurance Benefits and is in the care of his mother, plaintiff Gonzales. All the other children who are members of the plaintiff class are also eligible for or actually are receiving Child's Benefits and are in the care of their mothers. The third requirement, marriage of the mother to the father, deprives plaintiff Boles and all other illegitimate children of the benefits of Mother's Insurance Benefits.

Plaintiff Boles is the son of an insured wage earner, Norman W. Boles, who died on October 10, 1971. The son and his mother, plaintiff Gonzalez, filed claims for Children's and Mother's Benefits under the Social Security Act. Plaintiff Boles was granted Children's Benefits, but plaintiffs were denied Mothers Benefits solely because the mother, plaintiff Gonzalez, had never been married to the deceased father.

After exhausting their administrative remedies, plaintiffs filed suit in the United States District for the Western District of Texas. The District Court certified the action as a class action on

behalf of "all illegitimate children and their mothers who are presently ineligible for Mother's Insurance Benefits solely because 42 U.S.C. § 402 (g)(1) restricts such benefits to women who were once married to the fathers of their children." Juris. Statement, App. A, pp. 1a-2a. The District Court then held that the marriage requirement for Mother's Benefits was unconstitutional discrimination against illegitimate children.

The District Court ordered payment of retroactive benefits to the individual plaintiffs. As to the class, the suit did not seek nor did the court order payment of benefits. The District Court enjoined the Secretary from denying benefits to the plaintiff class solely by reason of the marriage requirement. It also ordered the Secretary to notify "all illegitimate children receiving Child's Insurance Benefits and their mothers that they are no longer ineligible for Mother's Insurance Benefits solely by reason of the marriage requirement declared invalid herein and that they may apply for such benefits." Juris. Statement, App. B, pp. 24a-25a. To actually receive benefits, all class members would still have to apply and meet all other eligibility requirements.

ARGUMENT

SUMMARY

The District Court correctly held that this Court's long line of decisions prohibiting discrimination against illegitimates in social welfare and other benefits, see Trimble v. Gordon, 430 U.S. 762, 766, n. 11 (1977), require the end of this invidious treatment of illegitimates in provision of Mother's Insurance Benefits. The opinion of this Court in Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) is unequivocal in its holding that Mother's Benefits are intended to benefit the child who is "entitled to the personal attention of the surviving parent if that parent chooses not to work." 420 U.S. at 651. The District Court's opinion herein, including its detailed analysis of the statutory structure and legislative evolution of the Social Security Act provisions on Mother's Benefits, clearly demonstrates that the statute unconstitutionally denies this benefit solely on the basis of illegitimacy. The decision below should be summarily affirmed on the merits because the argument of appellant is so insubstantial as not to warrant further argument. Supreme Court Rule 16(c).

The class action aspect of the case did not involve any claim for Social Security Benefits. Therefore, the restrictions on actions set forth in the Social Security Act, 42 U.S.C. § 405(g) and (h), as interpreted in Weinberger v. Salfi, 422 U.S. 749 (1975), are not applicable. The basic relief afforded the class is a notice to the class, if this Court affirms on the merits, that they are no longer ineligible for benefits solely because of the marriage requirement and may apply for benefits. Without this notice, thousands of eligible claimants previously denied Mother's Benefits will not learn that they may now be eligible.

The defense of sovereign immunity was not raised in the District Court and may not be raised now for the first time. Dothard v. Rowlinson, 433 U.S. 321 (1977). Failure to plead or otherwise raise the issue below also constitutes a waiver of the defense. Federal Rule of Civil Procedure 8(c).

I. DENIAL OF MOTHER'S BENEFITS TO ALL ILLEGITIMATES AND THEIR MOTHERS AND GRANTING MOTHER'S BENEFITS TO ALL LEGITIMATE CHILDREN AND THEIR MOTHERS, REGARDLESS OF ACTUAL DEPENDENCY, IS UNCONSTITUTIONAL DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN IN VIOLATION OF THE FIFTH AMENDMENT

A. Mother's Benefits Are Intended As Benefits To The Child

In Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) this Court held that Mother's Benefits are for the benefit of the child. An entire section of the opinion, Part II, Section B, (420 U.S. at 645-53), is devoted to the point. The following excerpts are but some of the repeated references to that statutory purpose in the opinion.

> ". . . § 402(g), linked as it is directly to responsibility for minor children, was intended to permit women to elect not to work and to devote themselves to the care of children. . . .
>
> "That the purpose behind § 402(g) is to provide children deprived of one parent with the opportunity for the personal attention of the other could not be more clear in the legislative history. The Advisory Council on Social Security, which developed the 1939 amendments, said explicitly that '[s]uch benefits (§ 402(g)) are intended as supplements to the orphan's benefits

> with the purpose of enabling the widow to remain at home and care for the children.' Final Report of the Advisory Council on Social Security 31 (1938). (Emphasis supplied.) In 1971, a new Advisory Council, considering amendments in the OASDI structure, reiterated this understanding: 'Present law provides benefits for the mother of young. . .children. . .if she chooses to stay at home and care for the children instead of working. In the Council's judgment, it is desirable to allow a woman who is left with the children the choice of whether to stay at home to care for the children or to work.' 1971. Advisory Council on Social Security, Reports on the Old-Age Survivors, and Disability Insurance and Medicare Programs 30 (1971) (hereinafter 1971 Reports). (Emphasis supplied.) 420 U.S. at 648-49.

This Court went on to explain that

> "The whole structure of survivor's benefits conforms to this articulated purpose (care of children)." 420 U.S. at 650.

It noted that widows without children obtain no benefits on the basis of their husband's earnings until they reach age 60, or in certain cases of disability, age 50. Mother's Benefits cease when the child is no longer eligible for Child's

Benefits or when the mother no longer has the child in her care or custody. Mother's Benefits also cease when the child reaches 18, although Children's Benefits may continue until age 22. This Court concluded that

> "This distinction also sustains our conclusion that § 402(g) was intended only to provide an opportunity for children to receive the personal attention of one parent, since Mother's Benefits are linked to Children's Benefits only so long as it is realistic to think that the children might need the parent at home." 420 U.S. at 651, n. 17. (Emphasis added.)

The ruling of this Court is summed up in one sentence in Justice Rehnquist's concurring opinion:

> "I believe the Court's examination (of the legislative history) convincingly demonstrates that the only purpose of § 402(g) is to make it possible for children of deceased contributing workers to have the personal care and attention of a surviving parent, should that parent desire to remain in the home with the child." 420 U.S. at 655.

In these circumstances it is clear that as a result of the marriage requirement for Mother's Benefits, only illegitimate children are denied

the benefit of the personal care and attention of a surviving parent.[1]

B. Discrimination in the Social Security Act Against Illegitimate Children in Providing Mother's Insurance Benefits Violates The Fifth Amendment

The decisions of this Court striking down discrimination against illegitimate children in Social Security and other social welfare benefits are

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[1] Appellant suggests that the case does not involve discrimination against all illegitimates and therefore "does not entail discrimination against illegitimate children." Jurisdictional Statement, p. 12, fn.9. But this court held in Jiminez v. Weinberger, 417 U.S. 628 (1974) that discrimination against one sub-class of illegitimates was unconstitutional even though some illegitimates received the Social Security Benefits in question. Furthermore, the examples cited are inapposite. Denial of benefits to once illegitimate children who have been legitimated by operation of state law but remain ineligible for Mother's Benefits because their mother never married their father is yet another form of discrimination against illegitimate children. In a case where the woman caring for the child of the deceased is not the child's mother, and was never married to the deceased, she is simply a foster parent without any legal relationship to father or child. In that circumstance, Mother's Benefits are denied both legitimate and illegitimate children because they are not living with their mother.

collected in the opinion of this Court in its recent decision on the subject, Trimble v. Gordon, 430 U.S. 762, 766, n. 11 (1977). The essence of the holdings is set forth in Gomez v. Perez, 409 U.S. 535, 538 (1973).

> ". . .a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their fathers, there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother."

and in New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619, 621 (1973);

> ". . .appellants' claim of the denial of equal protection must be sustained, for there can be no doubt that the benefits extended under the challenged program are as indispensable to the health and well-being of illegitimate children as to those who are legitimate."

This Court now permits disparate treatment of illegitimates only in situations which involve the special considerations applicable to proof of paternity. Lalli v. Lalli, No. 77-1115, 47 L.W. 4061 (December 11, 1978) and Mathews v. Lucas, 427

U.S. 495 (1976). These considerations do not apply here because no issue of paternity arises in the case of Mother's Benefits which are payable only to mothers and children where the children are already receiving Children's Benefits. Any question of paternity has already been resolved in the granting of Children's Benefits.

Moreover, the contrast between Jiminez v. Weinberger, 417 U.S. 628 (1974) and Trimble v. Gordon, 430 U.S. 762 (1977) on the one hand, and Lalli v. Lalli, supra, and Mathews v. Lucas, supra, on the other, illustrates the unconstitutionality of the statutory provision which denies Mother's Benefits to all illegitimates because their mother had not married their father, while granting them to all legitimate children. Both Jiminez and Trimble involved an absolute bar to Social Security Benefits or intestate inheritance for children whose mother had never married their father. In Lalli and Lucas, on the other hand, illegitimate children who established paternity or support in the manner prescribed by statute qualified for inheritance or Social Security Benefits.

Jiminez v. Weinberger, supra, involved the situation of children of a disabled insured worker born after the onset of the disability. After-born legitimate children and certain classes of

after-born illegitimate children received Children's Insurance Benefits, but other after-born illegitimate children were barred from benefits, regardless of whether they were living with or dependent on the insured. This Court found that the statute was both overinclusive by granting benefits to children not dependent on the insured and underinclusive by denying benefits to some illegitimate children who were actually dependent on the insured. It concluded (417 U.S. at 637):

> ". . .hence to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws guaranteed by the due process clause of the Fifth Amendment."

The case of Mother's Benefits at bar is even a stronger example of an unconstitutional statute because it encompasses a total exclusion of all illegitimates from Mother's Insurance Benefits and the inclusion of all legitimate children, regardless of dependency. Mathews v. Lucas, 427 U.S. 495 (1976), in contrast, involved only overinclusion, not underinclusion, since under the provision in question there, "any otherwise eligible child may qualify for survivorship benefits by showing contribution to support or cohabitation, at the time of death." 427 U.S. at 512. Unlike

here, the disfavored class had the opportunity to qualify for benefits by proving dependency.

Similarly, as this Court noted in Lalli v. Lalli (No. 77-1115, December 11, 1978), the Illinois inheritance statute in Trimble v. Gordon, 430 U.S. 762 (1977) "was constitutionally flawed because, by insisting upon not only an acknowledgement by the father, but also the marriage of the parents, it excluded 'at least some significant categories of illegitimate children. . .'". 47 L.W. at 4062. In contrast, in Lalli, ". . .the marital status of the parents is irrelevant. The single requirement at issue here is an evidentiary one--that the paternity of the father be declared in a judicial proceeding sometime before his death. The child need not have been legitimated in order to inherit from his father." Id. at 4063.

Appellant relies primarily on a Social Security case that does not involve discrimination against legitimate children at all, Califano v. Jobst, 434 U.S. 47 (1977). The distinction is of the essence. In the illegitimacy cases and those involving discrimination against women, Califano v. Goldfarb, 430 U.S. 199 (1977) and Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), this Court has stricken most forms of disparate treatment of Social Security Benefits. In other cases, it has upheld general

classifications, because "(g)eneral rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases." Califano v. Jobst, 434 U.S. 47, 53. In the latter class of cases, the principle of Dandridge v. Williams, 397 U.S. 471 (1970) applied, and the statute may draw distinctions in granting social welfare benefits so long as they have a rational basis, even though the classification is not made with mathematical certainty or results in some inequality. Mathews v. de Castro, 429 U.S. 181, 185 (1976). But the same cases also acknowledge that distinctions based on sex and illegitimacy are reviewed in a different fashion. For example, in Califano v. Jobst, supra, this Court noted that the marriage rule involved there "cannot be criticized as merely an unthinking response to stereotyped generalizations about a traditionally disadvantaged group," 434 U.S. at 54, and cited Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), involving sex discrimination, Jiminez v. Weinberger, 417 U.S. 628 (1974), involving discrimination against illegitimates, and Loving v. Virginia, 388 U.S. 1 (1967), involving race discrimination. 420 U.S. at n. 10.

Although the strict scrutiny applicable to race discrimination is not applicable to illegitimates, Mathews v. Lucas, 427 U.S. 495, 506 (1976), this Court has indicated that the courts must more closely analyze the statutory purpose and the rationality of the means sought to achieve it when discrimination against illegitimates results. In Trimble v. Gordon, 430 U.S. 762 (1977), the Court noted that although the strict scrutiny test is not applicable to illegitimacy cases, illegitimacy is analogous in many respects to the personal characteristics that have been held to be suspect when used as the basis for statutory differentiation. 430 U.S. at 767. This Court then concluded:

> "Despite the conclusion that classifications based on illegitimacy fall in a 'realm of less than strictest scrutiny,' Lucas also establishes that the scrutiny 'is not a toothless one,' id., at 510; 96 S.Ct. at 2764, a proposition clearly demonstrated by our previous decisions in this area." Id.

As the opinion of the District Court demonstrates convincingly, Jurisdictional Statement, App. B., p. 20a-22a, this Court has followed this pattern of careful evaluation in the past ten years. Most illustrative is Jiminez v. Weinberger, 417 U.S. 628 (1974), where discrimination against

a class of illegitimates in Social Security Benefits was held unconstitutional despite a strong argument that the differential treatment was necessary to prevent spurious claims of paternity. In contrast to the decisions in cases not involving illegitimates or sex, Chief Justice Burger's opinion for this Court closely examines the problem of spurious claims and finds they could be met without a blanket exclusion of a class of illegitimate children.

Where sex discrimination is involved, both Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) and Califano v. Goldfarb, 430 U.S. 199 (1977) struck down provisions of the Social Security Act even though they rested on the wholly realistic assumption that men are less likely to be dependent on their wives than women on their husbands.[2] Similarly, Congress could just as rationally have concluded that illegitimate children receive less support from their fathers than legitimate

[2]In contrast, in Mathews v. de Castro, 429 U.S. 181 (1976), which did not involve sex discrimination but rather, a classification of wives as against divorced wives, this Court rested its decision on the fact that "Congress could have rationally assumed that divorced husbands and wives depend less on each other for financial and other support than do couples who stay married."

children. But this Court has required that a finer line be drawn if discrimination against illegitimate children is ever to be sustained, and has overturned provisions of the Social Security Act and other statutes which wholly bar all benefits to illegitimates. Jiminez v. Weinberger, 417 U.S. 628 (1974), Davis v. Richardson, 342 F.Supp. 588 (D.Conn.), aff'd, 409 U.S. 1069 (1972); Griffin v. Richardson, 346 F.Supp. 1226 (D.Md.), aff'd, 409 U.S. 1069 (1972). The summary affirmances of Davis and Griffin are particularly instructive. These cases, along with Weber v. Aetna Casualty and Surety Company, 406 U.S. 164 (1972), involved provisions of the Social Security Act and the Louisiana Workers Compensation Act which provided that if total benefits exceeded the maximum allowable, all benefits to illegitimate children be reduced first, without any reduction for legitimates. These cases rejected the very same argument that Appellant offers here, that the greater likelihood of support for legitimate children renders total discrimination against illegitimates constitutionally permissible.[3] Moreover, the District Court's

[3]The Weber, Davis and Griffin cases also expressly rejected appellant's claim herein that possible reduction in benefits to the legitimate children can justify denial of benefits to illegitimate children.

analysis of the allowance of Mother's Benefits in a number of situations, including the case of some divorced wives to whom no obligation of support is due and where there is little likelihood of support, see Jurisdictional Statement, App. B., pp. 10a-13a, demonstrates that the "likelihood of support" argument is nothing more than an after-the-fact excuse for discrimination based on status of birth.

This Court's admonition to look at the reality of the statutory purpose in classifications based on illegitimacy requires the conclusion that the total denial of Mother's Benefits to illegitimates is unconstitutional. The history of the Social Security Act reveals that Congress discriminated against illegitimate children by reason of the historic prejudice the law evidenced against them until this Court called a halt in Levy v. Louisiana, 391 U.S. 68 (1968). The District Court accurately concluded (Jurisdictional Statement, App. B., pp. 23a-24a):

> "The reality of the history of the Social Security Act is that the Act discriminated against illegitimate children because of the stigma of their birth, the very kind of legislation the Supreme Court has consistently condemned since 1968. Until 1965, twenty-six years after Children's Benefits were first instituted, the Social Security Act gave no benefits to illegitimate children. See Davis v. Richardson, 342 F.Supp. 588, 591 (D.Conn.), summarily aff'd, 409 U.S. 1069 (1972). Then Congress included illegitimate children but hedged their benefits with a series of discriminatory provisions, almost all of which have been struck down by the Supreme Court. The last vestige of this discrimination now appears to be before this Court, and the Court is of the opinion that it should suffer the same fate. Illegitimate children have an equal need and an equal right with legitimate children for the opportunity to have their mothers stay home and care for them when they are young."

II. THE SOCIAL SECURITY ACT, 42 U.S.C. § 405(h), DID NOT DEPRIVE THE DISTRICT COURT OF JURISDICTION TO AFFORD THE CLASS RELIEF WHICH MERELY NOTIFIED CLASS MEMBERS OF THE REMOVAL OF THE UNCONSTITUTIONAL MARRIAGE REQUIREMENTS WHERE THE ACTION DID NOT SEEK RECOVERY OF SOCIAL SECURITY BENEFITS FOR CLASS MEMBERS

This case, unlike Weinberger v. Salfi, 422 U.S. 749 (1975), does not involve any claims for Social Security Benefits for members of the plaintiff class. Only the named plaintiffs, who exhausted

their administrative remedies, will receive benefits under the order of the District Court. Juris. Statement, App. B., pp. 24a-25a. The complaint herein was expressly amended to delete any request for benefits on behalf of the class. The only relief awarded to the class is twofold:

(1) The Secretary is ordered to "notify all illegitimate children receiving Children's Insurance Benefits and their mothers that they are no longer ineligible for Mother's Insurance Benefits solely by reason of the marriage requirement declared invalid herein and that they may apply for such benefits" (emphasis added). Juris. Statement, App. B., p. 25a.

(2) The Secretary is enjoined from denying benefits "to Plaintiffs and the Plaintiff Class on the basis of the marriage requirement declared unconstitutional herein." Juris. Statement, App. B., p. 24a. A decision of this Court affirming would have the same effect, so that the real importance of the class action is that it affords notice of the result to the members of the class.

As to the class, this is not an action "to recover on any claim" arising under Title II of the Social Security Act nor to review any decision or findings of fact of the Secretary. See 42 U.S.C.

§§ 405(g) and (h). As this Court noted in Mathews v. Eldridge, 424 U.S. 319 (1976), Weinberger v. Salfi, supra, held that 42 U.S.C. § 405(h) precludes federal question jurisdiction "in an action challenging denial of claimed benefits." (Emphasis added.) 424 U.S. at 327.

Salfi required exhaustion of administrative remedies, but only where the suit sought recovery of benefits. The District Court in Salfi had expressly ordered the Secretary "to provide such benefits (to the entire class) from the time of original entitlement." See 422 U.S. 749, 755-56. Since Salfi was a suit to recover benefits and many members of the certified class had not exhausted their remedies, no jurisdiction existed to award benefits to the class.

The language of § 405(g) and (h) makes it clear that they are no bar to the class relief awarded herein. Regardless of whether class relief is authorized in suits relying solely on 42 U.S. § 405(g), an issue before this Court in Califano v. Elliott, cert. granted, No. 77-1511 (Oct. 3, 1978), jurisdiction as to the class herein exists under 28 U.S.C. § 1331, as a constitutional claim is asserted. Jurisdiction under § 1331 is not barred by 42 U.S.C. § 405(h) because that section applies only to claims for benefits, whereas the claim here

on behalf of the class does not seek benefits but only a notice that the unconstitutional barrier to their receipt of benefits has been removed. Each member of the plaintiff class must still file a claim and satisfy all the remaining requirements for Mother's Benefits, and even in such a case, the District Court has not ordered payments of benefits.

If the limited relief of notice to the class is denied, and the District Court is affirmed on the merits, thousands of eligible families will continue to be unconstitutionally denied benefits, unless they happen to read the United States Reports. Without notice, these families will continue to believe what they were told when they went to the Social Security office on the death of the father of the child--that they are eligible only for Children's Benefits. On the other hand, if this Court reverses on the merits, the class will be bound by the decision under the doctrine of stare decisis. There is nothing in the Social Security Act which requires such an unjust and discriminatory result.

III. THE DEFENSE OF SOVEREIGN IMMUNITY IS NOT BEFORE THIS COURT BECAUSE IT WAS NOT RAISED IN THE COURT BELOW AND WAS NOT PLEADED AS AN AFFIRMATIVE DEFENSE

A. The Defense of Sovereign Immunity Was Not Raised Below and May Not Be Asserted Here.

Question 3 of the Jurisdictional Statement, p.2, seeks to place before this Court the issue of whether sovereign immunity bars the District Court's award of Mother's Insurance Benefits to the named plaintiffs retroactive to the time prescribed by the Social Security Act, 42 U.S.C. § 402(j)(1) (twelve months prior to date of filing an application). This question was not presented to the Court below, either by answer or otherwise. It may not be raised for the first time herein.

Issues not raised in the courts below cannot be raised for the first time on appeal before this Court. This rule was recently reiterated in a case involving a direct appeal from a District Court, Dothard v. Rowlinson, 433 U.S. 321, n.1 (1977), where this Court stated:

> "The appellants sought to raise for the first time in their brief on the merits the claim that Congress acted unconstitutionally in extending Title VII's coverage to state governments. . . (citations omitted). Not having been raised in the District

> Court, that issue is not before us. (Emphasis added.)

The rule is of long standing. See, e.g., Tyrrell v. District of Columbia, 243 U.S. 1 (1917) and Adkickes v. S. H. Kress & Co., 398 U.S. 144, 147, n.2 (1970.

There are no exceptional circumstances here to warrant a deviation from the general rule. See Duignan v. United States, 274 U.S. 195, 200 (1927). Retroactive relief was granted only to the named plaintiffs (Juris. Statement, App. B, pp. 24a-25a). All that is involved in retroactive benefits is a few thousand dollars to the individual named plaintiffs.

B. Any Defense of Sovereign Immunity Was Waived By Failure To Plead It As An Affirmative Defense or Otherwise Raise It Below.

Any defense of sovereign immunity appellant may have had was waived by failure to plead it as an affirmative defense, Federal Rule of Civil Procedure 8(c), see Answer, or otherwise raise it in the District Court. "The plea of sovereign immunity constitutes an affirmative defense," Aerotrade, Inv. v. Republic of Haiti, 376 F.Supp. 1281, 1283, n.7 (S.D.N.Y. 1974). See also. Petrol Shipping Corp. v. Kingdom of Greece, 360 F.2d 103 (2d Cir.), cert. den., 385 U.S. 931 (1966). ". . . technically speaking, sovereign immunity is not a

jurisdictional defect but rather a substantive defense like incapacity or incompetency." Pan American Tankers Corp. v. Republic of Vietnam, 291 F.Supp. 49, 52 (S.D.N.Y. 1968). Cf. Federal Rule of Civil Procedure 9(a). See also, Green v. James, 473 F.2d 660 (9th Cir. 1973).

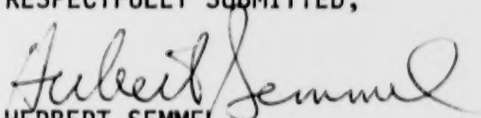
If an affirmative defense is not pleaded, it is waived. 2A Moore, Federal Practice ¶ 8.27(3), p. 1853 (2d ed. 1975). Radio Corporation of America v. Radio Station KYFM, Inc., 424 F.2d 14 (10th Cir. 1970). Congress made it clear that sovereign immunity is waived by failure to plead affirmatively by providing in the Foreign Sovereign Immunities Act of 1976, P.L. 94-583, that sovereign immunity may be waived "explicitly or by implication," 28 U.S.C. § 1605(a)(1). The Report of the House Judiciary Committee, House Report No. 94-1487 (Sept. 9, 1976) states:

> An implicit waiver would also include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity." 5 U.S. Code, Cong., Admin. News, 94th Cong., 2d Sess., p. 6617.

CONCLUSION

The judgment of the District Court should be affirmed.

RESPECTFULLY SUBMITTED,



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